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Resale Price Maintenance in France

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I. INTRODUCTION

On October 10, 2013, the Paris Court of Appeals confirmed a landmark decision of the French Competition Authority condemning three leading manufacturers active in the dog and cat food sector to a EUR 35.3 million fine for having imposed resale prices and territorial restrictions on their distributors in France during five years.² Between 2004 and 2008, two of these manufacturers directly negotiated the resale prices of the pet food products with specialist retailers (pet shops, farmers, and vets), even though these retailers purchased their products from wholesalers. The wholesalers were therefore not free to set their own prices, preventing them from gaining competitive prices.

This recent decision of the Paris Court of Appeals illustrates the particular attention the French authorities are paying to the issue of minimum or fixed resale price maintenance ("RPM"). For this purpose, they can rely on two co-existing sets of rules prohibiting minimum RPM: those applicable to unfair commercial practices and those based on competition law.

II. PROHIBITION OF MINIMUM RPM ON THE GROUNDS OF COMPETITION LAW

Article L.420-1³ of the French Commercial Code ("FCC")—equivalent to Article 101 TFEU—prohibits agreements intended to prevent prices from being determined by the free play of the market by artificially encouraging price increases.

Insofar as it can distort competition, RPM can fall within the scope of this provision. In order to assess whether a RPM agreement is anticompetitive, the French Competition Authority adopts a case-by-case approach, making a distinction between minimum and fixed resale prices, on the one hand, and maximum or recommended sale prices, on the other hand.

A. Absolute Prohibition of Minimum Resale Price Maintenance

In principle, minimum RPM falls within the scope of Article L.420-1 FCC as a vertical anticompetitive practice. However, and by exception, Article L. 420-1 FCC does not apply to minimum RPM practices resulting from a legislative or regulatory provision (Article L.420-4-I-1⁴ FCC). For instance, Law No 81-766 of August 10, 1981 relating to book prices has turned the imposition of retail prices by publishers into an obligation. This law is subject to a restrictive interpretation.⁵

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² Paris Court of Appeals, 10 October 2010, RG No. 2012/07909. French Competition Authority, decision No. 12-D-10 dated 20 March 2012, relating to practices in the sale of dry dog and cat food in specialist retail.

³ Article L.420-1 FCC: <http://195.83.177.9/code/liste.phtml?lang=uk&c=32&r=3096>

⁴ Article L.420-4-I-1 FCC: <http://195.83.177.9/code/liste.phtml?lang=uk&c=32&r=3096>

⁵ French Supreme Court, 28 January 2010, No. 08-70026.

Where this legal exception does not apply, the Competition Authority condemns any clear contractual provision between manufacturers and retailers formalizing a minimum resale price-fixing agreement, in application of Article L.420-1 FCC.

For instance, these contractual clauses can cover provisions whereby the distributor expressly undertakes to respect the recommended prices. The mere presence of this clause is sufficient to characterize the agreement as anticompetitive, even if it is not implemented.⁶

Contractual clauses fixing the margin of the distributor or clauses fixing the maximum level of reductions that the distributor can grant to consumers also amount to anticompetitive minimum RPM.

B. Authorization of Maximum or Recommended Prices, Provided They Do Not Actually Amount To Minimum RPM

As opposed to minimum resale price maintenance, the French Competition Authority and French Courts do not consider maximum and recommended prices as hardcore restrictions. The mere recommendation or suggestion of a resale price is not, as such, prohibited, provided that it does not result in binding resale prices imposed on distributors: the distributor must remain free to price at the level it wishes to.

Where there is not a clear contractual clause demonstrating the existence of a minimum resale price agreement, the Competition Authority checks whether the following three indicators are in place:

- manufacturers communicated recommended retail prices to their retailers;
- manufacturers monitored retailers' compliance with the recommended retail prices and set up a retail sale price control system; and
- retailers applied the recommended retail prices.

For instance, the French Competition Authority referred to these criteria to condemn five manufacturers and three distributors active in the toys distribution sector for having entered into vertical resale price fixing agreements.⁷ This decision of December 2007 was confirmed by the French Supreme Court in April 2010.

In this case, the Competition Authority found there to be an anticompetitive vertical agreement on the basis of the following elements:

- retail prices recommended by the manufacturers had been communicated to the retailers through pre-printed Christmas catalogs;
- the distributors had actively participated in monitoring practices, increasing retail sale prices for “problematic toys.” In particular, one of the distributors had set up a

⁶ French Competition Authority, decision No. 06-D-37, relating to practices in the cycle products sector, paragraph 576; decision No 05-D-07, relating to practices in the arms and ammunition sector, ¶ 17.

⁷ French Competition Authority, decision No. 07-D-50 dated 20 December 2007, paragraph 615; Paris Court of Appeals, 28 January 2009, pages 15-16; French Supreme Court, 7 April 2010; decision No. 06-D-04 bis, dated 13 March 2006, relating to practices in the luxury perfumes sector, ¶ 515.

promotional campaign claiming that it would refund ten times the price difference if customers could find certain toys cheaper elsewhere. This distributor thereby encouraged consumers to monitor prices on its behalf. Then, using information obtained when reimbursing consumers, the distributor systematically asked its suppliers to ensure that lower prices were not offered to its competitors. For this purpose, the distributor circulated to the suppliers a list of “price troubles,” called “letter to Father Christmas,” requesting its suppliers to ask its competitors applying lower prices to raise their prices;

- last, retailers had applied the recommended retail prices as several documents collected during the investigation demonstrated that prices recommended by the suppliers in the Christmas catalogs were substantially applied by the distributors.

In this respect, it is worth noting that the Competition Authority considers that where 80 percent of the prices applied by a distributor actually amount to the recommended retail prices, the distributor is deemed to have applied the recommended prices. If 80 percent of the prices are not recommended prices, further analysis of the price dispersion may still allow the Competition Authority to evidence an implementation of the recommended prices.

As a result, the Competition Authority imposed a EUR 37 million fine on the toys suppliers and distributors concerned.

C. No Exemption For Minimum Resale Prices

In light of French case law, minimum resale price maintenance does not benefit from an exemption, either on the basis of the vertical block exemption or on the basis of an individual exemption:

1. No Application of the Vertical Block Exemption

The French Competition Authority refers to the EU Vertical Block Exemption Regulation (VBER) n°330/2010, which grants a safe harbor for vertical agreements, provided that the market shares of the supplier and the distributor do not exceed 30 percent of the relevant market on which they sell or purchase the contract goods or services.

The benefit of the block exemption does not, however, extend to agreements containing a “hardcore” restriction of competition and both case law and Article 4 of the VBER qualify the agreements having as their direct object the observation of a minimum resale price level by the buyer as a “hardcore” restriction.⁸

2. No Individual Exemption in Practice

Where the VBER does not apply, recommended resale prices may in theory benefit from an individual exemption on the grounds of L. 420-4-I-2° FCC, if the parties can demonstrate that the agreement:

- contributes to improving the production or distribution of goods or to promoting technical or economic progress;
- allows consumers a fair share of the resulting benefit;

⁸ Paris Court of Appeals, 26 January 2012, RG no. 2010/23945, page 44.

- does not impose restrictions which are not indispensable to these objectives; and
- does not afford the parties the possibility of eliminating competition.

These cumulative conditions are equivalent to those of Article 101, paragraph 3, TFEU.

a. Minimum RPM Agreements are Unlikely to Fulfill the Conditions for an Individual Exemption

According to the European Commission's Guidelines on vertical restraints,⁹ minimum RPM generally facilitates anticompetitive practices between suppliers by enhancing price transparency on the market, thereby making it easier to detect whether a supplier deviates from a collusive equilibrium by cutting prices.

RPM may also facilitate collusion between distributors by eliminating intra-brand price competition. In particular, RPM can result in price increases as distributors are prevented from lowering their sales price for a particular brand, thereby reducing pressure on the manufacturer's margins.

RPM may also reduce inter-brand competition. The increased margin that RPM may offer distributors can indeed entice them to favor a particular brand over rival brands when advising customers (even where such advice is not in the interest of these customers) or not to sell these rival brands at all.

Last, RPM can reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers or price discounters from entering the market.

For the above reasons, minimum RPM agreements are unlikely to fulfill the conditions for an individual exemption. This has been confirmed in French case law.

b. Justifications for Minimum RPM Rejected by the Competition Authority

In cases where they have considered that the recommended prices were, in fact, imposed prices on the basis of the criteria referred to above, the Competition Authority and French Courts have never accepted any justification of resale price maintenance to date, either practical or founded on efficiency gains. For instance, the Competition Authority has considered that the following arguments were not acceptable justifications:

- RPM would enable the fixing of a “fair price” for consumers, maintenance of competitiveness, and prevention of an overproduction crisis;¹⁰
- imposing prices to franchisees would be a “way of disclosing a low cost price policy;”¹¹
- RPM would be justified by the “uncertainty relating to parity of currencies;”¹²

⁹ European Commission's Guidelines on vertical restraints, 19 May 2010, C 130/01, ¶ 224.

¹⁰ Competition Authority, decision No. 05-D-55 dated 12 October 2005, relating to practices in the Lavanda Essential oils production Sector, ¶¶ 78 to 82.

¹¹ Competition Authority, decision No. 94-D-60 dated 13 December 1994, relating to practices in the laundry detergents sector, page 22.

- there exists a “concern of guaranteeing a sufficient and constant quality of the services performed” by the members of the network;¹³
- there are situations peculiar to luxury products and brand image;¹⁴ and
- the need to maintain local shops as well as training and information of retailers in country areas.¹⁵

In these cases, the Competition Authority recalled that the “fair price” is the one established on a competitive market and that the parties had not demonstrated that these objectives could not have been obtained without imposing a minimum RPM.¹⁶

It is therefore very difficult to obtain an individual exemption in case of minimum RPM, whatever the RPM is direct or indirect. This means that the risk of fines is very important in case of minimum RPM.

D. Sanctions In Cases of Minimum RPM

Minimum RPM might trigger different types of sanctions for companies, in particular heavy fines and criminal penalties.

- **Heavy fines:** Pursuant to Article L. 464-2 FCC, a company which is party to an anticompetitive agreement may incur a fine of up to 10 percent of its consolidated global annual tax-free turnover. According to French case law, even if they are less serious than cartels, RPM practices are “serious by nature because their consequence is to confiscate, for the benefit of the authors of the infraction, the benefits which the consumer has the right to expect from intra-brand competition on the retail market.”¹⁷

In certain cases, the Competition Authority only imposes sanctions on the sole manufacturer with a leading role, and not upon distributors that only partially contributed to the retail price-fixing practice.¹⁸

However in some cases, the Competition Authority not only fined the manufacturers, but also some distributors. This was the case in the luxury perfumes case where 13 suppliers and 3

¹² Competition Authority, decision No. 07-D-06, 28 February 2007, relating to practices in the video games sector, ¶107.

¹³ Competition Authority, decision No. 00-D-75 dated 6 February 2001, relating to practices in the distance flower transmission sector.

¹⁴ Competition Authority, decision No. 06-D-04 dated 13 March 2006 relating to practices in the luxury perfume sector, ¶¶ 648-650.

¹⁵ Competition Authority, decision No. 92-D-38 dated 9 June 1992, G.I.T.E.M, page 12.

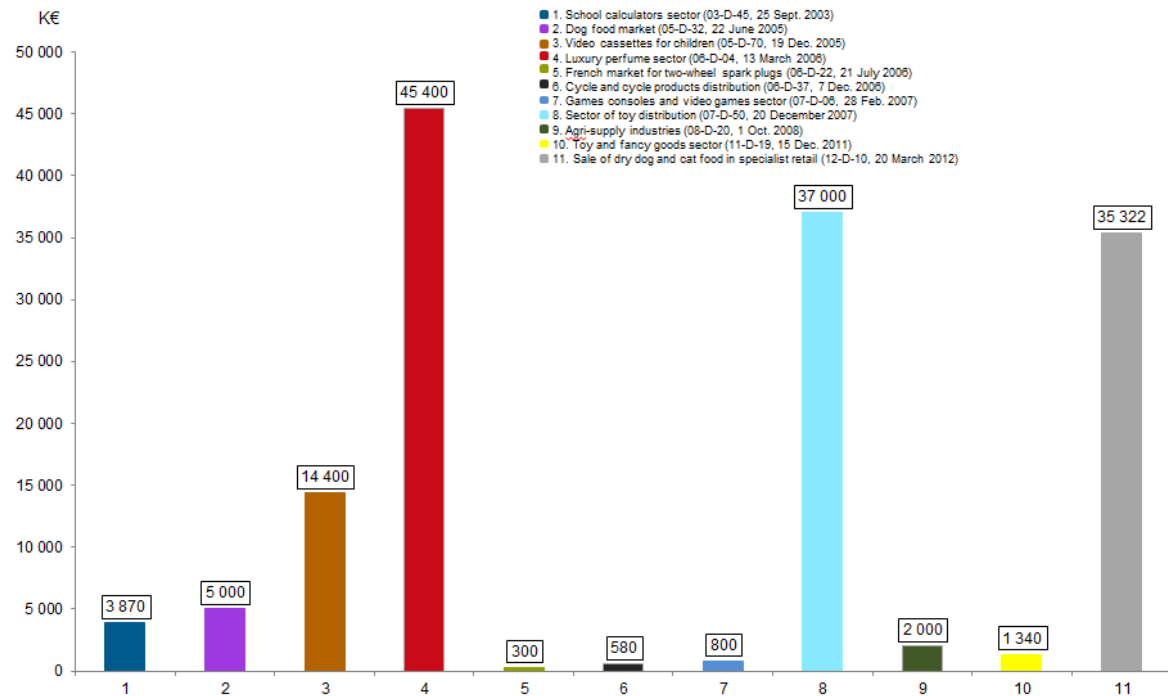
¹⁶ For other examples of non-admissible justifications, see International League of Competition Law, Bordeaux – French National Report, September 2010 – “Which, if any, agreements, practices or information exchange about prices should be prohibited in vertical relationships?”.

¹⁷ Competition Authority, decision No. 08-D-20 of October 1st 2008 relating to practices implemented by subsidiaries of Compagnie Financière et de Participation Roullier, ¶ 103.

¹⁸ Competition Authority, decision No. 07-D-06 dated 28 February 2007, relating to practices in the video games sector.

distributors were fined EUR 45.4 million (which is the heaviest fine ever imposed in France for RPM practices).¹⁹

The following graph summarizes the main fines imposed by the Competition Authority over the last ten years for RPM:



- **Criminal penalties:** Article L. 420-6 of the Commercial Code provides that "any natural person who fraudulently takes a personal and decisive part in the conception, organization or implementation of the practices referred to in articles L. 420-1 and L. 420-2, shall be punished by a prison sentence of four years and a fine of € 75,000."

However, criminal sanctions have not been applied in cases relating to minimum RPM practices to date.

III. PROHIBITION OF MINIMUM RPM ON THE GROUNDS OF UNFAIR COMMERCIAL PRACTICES

French law is characterized by the co-existence of two sets of rules prohibiting minimum RPM. Along with Article L.420-1 FCC prohibiting anticompetitive practices, Article L. 442-5 FCC also provides that it is illegal "for any person to impose, directly or indirectly, a minimum price for the resale of a product or a service, or to impose a minimum profit margin."

In application of this provision, minimum RPM is deemed to be restrictive *per se*, whatever the effect of the practice on competition. The negative impact of this restrictive practice will therefore be deemed proven without any effect-based assessment on the relevant market.

¹⁹ Competition Authority, decision No. 06-D-04, dated 13 March 2006, relating to practices in the luxury perfumes sector.

For instance, the French Supreme Court confirmed that a supplier who had refused to deliver a product to a reseller because its resale price was too low had, thereby, aimed at imposing a minimum resale price to its distributor, in violation of Article L. 442-5 of the French Commercial Code.²⁰ Any person imposing a direct or indirect minimal resale price incurs a criminal fine up to EUR 15,000. However, the number of condemnations on this ground remains quite limited.

IV. CONCLUSION

The French authorities take a very strict approach to RPM, focusing on prices, despite the fact that competition also takes place with respect to quality of service, brand image, supplies, etc. In this respect, the *Leegin* decision handed down by the U.S. Supreme Court on June 28, 2007 could potentially open the way to an evolution of the Competition Authority's decision-making practice as regards justifications based on efficiency gains that may be linked to minimum RPM.

However, the mere fact that a specific provision prohibits minimum RPM as an unfair commercial practice, whatever the efficiency gains on the market, appears to be a barrier to an evolution of French case law. Manufacturers and wholesalers should therefore be very careful to avoid such practices with their retailers in France.

²⁰ French Supreme Court, 31 October 2000, Bull. Crim., p. 966.